NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)(an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Denard Stokeling respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion vacating Mr. Stokeling's non-ACCA sentence, and remanding for resentencing as an Armed Career Criminal, *United States v. Stokeling*, __ Fed. Appx. ___, 2017 WL 1279086 (11th Cir. April 6, 2017) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals vacating Mr. Stokeling's sentence was entered on April 6, 2017. Mr. Stokeling sought, and the Court granted, a 30-day extension of the time until August 4th for filing a petition for writ of certiorari. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

> **(e)(2)** As used in this subsection – . . .
>
> > **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
> >
> > > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

Fla. Stat. § 812.13. Robbery (1997)

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. ...
>
> (3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

STATEMENT OF THE CASE

The Charges and Plea

On October 20, 2015, a federal grand jury charged Denard Stokeling with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §922(g)(1) and §924(e)(1). On March 2, 2016, Mr. Stokeling pled guilty to that charge.

The PSI and Sentencing

In the PSI, the Probation Officer opined that Mr. Stokeling was subject to enhanced sentencing as an Armed Career Criminal under 18 U.S.C. § 924(e) because three of his prior convictions were qualifying "violent felonies" or "serious drug offenses:" namely, his Sept. 27, 2997 conviction in Dkt. #F96-11220 for unarmed Florida robbery; his conviction on that same date in Dkt. #F97-14434 for armed robbery/home invasion/kidnapping; and his February 10, 19997 conviction in Dkt. #F97-1221 for sale/manufacture/delivery of cocaine.

Accordingly, the Probation Officer recommended that pursuant to U.S.S.G. § 4B1.4(b)(3)(B), his otherwise-applicable Chapter 2 offense level of 24 under § 2K2.1(a)(2), be increased to a level 33. With a 3-level reduction for acceptance of responsibility, his total recommended offense level was 30. And, at a Criminal History of V, his recommended advisory guideline range as an Armed Career Criminal was 180-188 months imprisonment.

Mr. Stokeling objected to the counting of both his robbery convictions as ACCA predicates, arguing that such convictions did not categorically require the

use of violent force. The government responded that they did, since in each case Mr. Stokeling was convicted after the Florida Supreme Court's decision in *Robinson v. State of Florida*, 692 So.2d 883 (1997) which had clarified that every robbery offense in Florida requires "resistance by victim that is overcome by the physical force of the offender."

At the August 28, 2016 sentencing, the district court granted the defense objection to the counting of his 1997 unarmed robbery conviction in Dkt. #96-11220 as an ACCA predicate, based upon the facts set forth in the PSI – which in the court's view "did not justify the enhancement." Without the ACCA enhancement, the court found that Mr. Stokeling's applicable Guideline range was 70-87 months imprisonment, and sentenced him to a term of 73 months imprisonment, followed by 2 years supervised release.

The Government's Appeal

The government appealed the district court's determination that Mr. Stokeling's 1997 unarmed robbery conviction was not an ACCA "violent felony," on two bases. First, it argued, the district court had impermissibly based that determination on whether the facts alleged in the PSI sounded "sufficiently violent," when this Court had repeatedly held that district courts are prohibited from basing the "violent felony" upon such judicial fact-finding. Second, the government argued, the 1997 unarmed robbery conviction categorically qualified as an ACCA violent felony pursuant to two prior Eleventh Circuit precedents: *United States v. Lockley*, 632 F.3d 1238, 1244-1245 (11th Cir. 2011), holding that a 2001 Florida robbery

conviction was categorically a "crime of violence" under the elements clause of the Guidelines, and *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), holding that a 1974 Florida armed robbery conviction qualified as a "violent felony" under the elements clause of the ACCA. The government emphasized, as it had below, that Mr. Stokeling was convicted after the Florida Supreme Court's decision in *Robinson* clarifying that the force used to commit a robbery offense in Florida must be enough to overcome "victim resistance."

Mr. Stokeling responded that the Court could and should affirm his sentence on any ground even if not considered by the district court, and specifically, here it should affirm for a number of reasons, including that it was clear from Florida law that overcoming victim resistance did not categorically require the type of "*violent* force" this Court had required in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). As support, he pointed out that in *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000), a Florida appellate court had affirmed a robbery conviction under Fla. Stat. § 812.13(1), where the State simply showed that the defendant had peeled back the victim's fingers before snatching money out of his hand. According to the *Sanders* court, the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed," and no more resistance, or "force," than that was necessary to uphold Sanders' strongarm robery conviction under § 812.13(1). *Id.* at 507. Mr. Stokeling also cited *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011), where another Florida appellate court had specifically rejected the defendant's argument

that actual "violence" was necessary for a robbery conviction in Florida, holding that the mere act of "engaging in a tug-of-war over the victim's purse" was sufficient for conviction. *Id.* at 323.

It was clear from these cases, Mr. Stokeling argued, that if the victim's resistance was itself slight, the "force" necessary to overcome it in Florida could also be slight. The *Curtis Johnson* level of "*violent* force" was not categorically necessary to overcome victim resistance, and seal a conviction, for Florida robbery. And therefore, under this Court's recent precedents clarifying the proper application of the categorical approach (*Descamps*, *Moncrieffe*, and *Mathis*), a conviction for that offense was not a qualifying ACCA predicate.

In reply, the government pointed out that the Eleventh Circuit had just decided *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) in a fractured opinion, where the only point of agreement between the three panelmembers was that a Florida robbery conviction after the Florida Supreme Court's April 24, 1997 decision in *Robinson* was a categorically a "violent felony" within the ACCA's elements clause. Under *Seabrooks*, the government argued, Mr. Stokeling's 1997 conviction for unarmed robbery was clearly a "violent felony," and he should have been sentenced as an Armed Career Criminal. However, the government added, *Dowd* and *Lockley* were also "correct that all Florida robbery convictions, regardless of whether they were committed before or after *Robinson*, are violent felonies."

And notably, several weeks later, the Eleventh Circuit expressly so held in *United States v. Fritts*, 841 F.3d 937 (11th Cir. Nov. 8, 2016). *See id.* at 942-943

(holding "based on our precedent in *Dowd* and *Lockley*," and in light of the Florida Supreme Court's decision in *Robinson*, that a 1989 (pre-*Robinson*) armed robbery categorically qualifies as a violent felony under the ACCA's elements clause; *Robinson* reaffirmed that mere snatching – "without resistance by the victim and the use of physical force to overcome the victim's resistance" – did not constitute a robbery under § 812.13, and *Robinson* "tells us what that statute always meant").

On April 6, 2017, the Eleventh Circuit vacated Mr. Stokeling's sentence and remanded for resentencing as an Armed Career Criminal, due to the district court's improper fact-finding in making the "violent felony" determination, and because *Fritts* had held that "a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA]." *United States v. Stokeling*, ___ Fed. Appx. ___, 2017 WL 1279086 at *1 (11th Cir. April 6, 2017). According to the court, *Fritts* was clear that it was "bound" by *Lockley*'s holding that "Florida robbery is categorically a crime of violence under the elements of even the least culpable of the[] acts criminalized by Florida Statutes § 812.13(1)." *Stokeling, id.* at *1 (citing *Fritts*, 841 F.3d at 941). And, the court added, Stokeling "cannot circumvent this holding "even if he presents arguments the prior panel did not consider." *Stokeling, id.* (citing *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006)).[1] Relying on *Fritts*, the court held that the "force element" of Florida robbery satisfies the elements clause of the ACCA, because

[1] *Lockley*, notably, had not considered whether the robbery statute was divisible, what the least culpable act under the statute was according to Florida caselaw, or what level of force was necessary for a robbery "by force" (since the appellant in *Lockley* had focused his argument on a robbery by "putting in fear").

Robinson had clarified that the use of "force" "requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Id.* at *2.

Judge Martin concurred, agreeing with the majority that Circuit precedent "dictates that Mr. Stokeling's prior robbery conviction under Fla. Stat. § 812.13 qualifies as a violent felony" under the ACCA," since he was convicted after the Florida Supreme Court's decision in *Robinson*. *Id.* at *2 (Martin, J., concurring) She wrote separately, however, to explain that she believed *Fritts* was wrongly decided, to the extent it held pre-*Robinson* Florida robbery convictions required the use of violent force. She acknowledged, however, that such a mistake "does not affect Mr. Stokeling." *Id.* at **2-5.[2]

Mr. Stokeling is currently set to be resentenced as an Armed Career Criminal on September 13, 2017.

[2] This Court denied certiorari in both *Seabrooks* and *Fritts* on June 19, 2017.

REASON FOR GRANTING THE WRIT

The Circuits are in conflict over whether a conviction for a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the ACCA, if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

The question of whether state robbery convictions necessarily have *violent* force "as an element" was not a pressing question for this Court when the ACCA's residual clause remained in existence. Many circuits, including the Eleventh, had easily concluded that the residual clause extended to categorically non-violent crimes due to the mere "risk" of physical injury during a robbery, or in its aftermath. In that vein, the Eleventh Circuit had held in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), that even a robbery by "sudden snatching," a crime which – by definition – requires no more force than that necessary to snatch money or an item from the victim's hand, and neither victim resistance nor injury, was nonetheless a "violent felony" and proper ACCA predicate within the residual clause because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim." *Id.* at 1313.

Once this Court eliminated the residual clause as the easiest route to an ACCA enhancement in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), however, lower courts have to reconsider whether state robbery crimes – long counted as "violent felonies" within the residual clause, or within the elements clause before this Court clarified the meaning of "physical force" as "*violent* force" in *Curtis Johnson v. United States*, 559 U.S. 133, 141 (2010), or the categorical

approach in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Descamps v. United States*, 133 S.Ct. 2276 (2013): and *Mathis v. United States*, 136 S.Ct. 2243 (2016) – would qualify as "violent felonies" under these intervening precedents.

Some circuit courts have risen to that task. Unlike the Eleventh Circuit, they have carefully re-examined their prior elements clause robbery precedents; strictly applied the dictates of the now-clarified categorical approach; carefully conducted the now-mandated threshold "divisibility" inquiry, *Mathis*, 136 S.Ct. at 2256; sought out the state courts' interpretation of the elements of their robbery offenses as mandated by *Curtis Johnson*, 559 U.S. at 138, and *Mathis*, 136 S.Ct. at 2256; and determined the minimum conduct necessary for conviction as required by *Moncrieffe*, 133 S.Ct. at 1680. *See, e.g., United States v. Gardner*, 823 F.3d 793, 801-804 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 682-686 (4th Cir. 2017); *United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016).

Notably, after conducting a proper analysis under the now-clarified categorical approach, at least one circuit – the Fourth in both *Gardner* and *Winston* – has concluded that two different common law robbery offenses, both of which require overcoming "victim resistance," do ***not*** categorically require the *Curtis Johnson* level of "*violent* force." 130 S.Ct. at 141 (defining "*violent* force" as "force capable of causing physical pain or injury to another person," which is "a substantial degree of force;" the word "violent" connotes "strong physical force"). *See Gardner*, 823 F.3d at 803 (North Carolina common law robbery "by violence"

does not qualify as an ACCA "violent felony" because it is clear from North Carolina caselaw that *de minimis* contact with the victim was sufficient for conviction, and the degree of force used was "immaterial"); *Winston*, 850 F.3d at 684-6855 (Virginia common law robbery by "violence" does not qualify as an ACCA "violent felony" because, as confirmed by Virginia appellate decisions, the minimum conduct sufficient to overcome resistance can be "slight;" thus, the offense does not require "violent force").

By contrast, the Eleventh Circuit – interpreting a statutory robbery offense based upon common law robbery, and which includes the same "resistance" element as the common law robbery offenses construed in the Fourth Circuit cases – has held (without reviewing ***any*** Florida appellate decisions) that simply ***because*** Florida robbery requires overcoming "victim resistance," the offense is categorically an ACCA violent felony. *See United States v. Seabrooks*, 839 F.3d 1326, 1340-1341, 1346, 1352 (11th Cir. 2016)(separate decisions by Hull, Baldock, and Martin, JJ.) (narrowly agreeing that Seabrooks' 1997 Florida robbery conviction was a "violent felony" according to *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) since Seabrooks' conviction post-dated the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997) which clarified that a Florida robbery offense requires overcoming victim resistance); *United States v. Fritts*, 841 F.3d 937, 940-944 (11th Cir. 2016) (following not only *Lockley* but an even earlier "precedent," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), to hold that all Florida robbery convictions, including those before *Robinson*, categorically qualify as ACCA

"violent felonies" since *Robinson* clarified what the Florida robbery statute "always meant").

In both *Seabrooks* and *Fritts*, the appellants informed the Court in their briefing that Florida caselaw made clear that overcoming "resistance" did not require violent force in every case. They urged the Eleventh Circuit, as Mr. Stokeling did here, to specifically consider decisions such as *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) and *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011), which confirmed that *violent* force was not necessary to overcome resistance where the resistance itself was slight. Both Seabrooks and Fritts argued that the analysis in *Lockley* and *Dowd* had been abrogated by this Court's intervening precedents in *Descamps*, *Moncrieffe*, and *Mathis*.

Nevertheless, in *Seabrooks* the Eleventh Circuit reflexively adhered to its prior precedent in *Lockley*, ignoring the appellant's argument that *Lockley*'s analysis had not survived the Court's clarification of the categorical approach in *Moncrieffe*, *Descamps*, and *Mathis*. And thereafter in *Fritts*, the Eleventh Circuit not only followed *Lockley*, but *Dowd*, which had demonstrably misapplied the "modified categorical approach" and contained no other analysis. In *Seabrooks* and *Fritts*, as well as in the case below, the Eleventh Circuit has steadfastly refused to review ***any*** Florida caselaw – deferring completely to its prior precedents in *Lockley* and *Dowd* which preceded *Moncrieffe*, and did not consult Florida law to determine the least culpable conduct for conviction.

In this regard, the Tenth Circuit has aligned itself with the Eleventh Circuit. Indeed, in construing the offense of Colorado statutory robbery – which like Florida statutory robbery – is based upon common law robbery, the Tenth Circuit chose to defer to a dictionary definition of "violence" instead of surveying the relevant Colorado appellate caselaw to determine the least culpable conduct under the statute. *See United States v. Harris*, 844 F.3d 1260, 1266-1268 (10th Cir. 2017)(acknowledging that "Colorado remains committed to the common law definition of robbery," but finding Colorado statutory robbery remains an ACCA "violent felony" due to the Colorado Supreme Court's statement that "there can be no robbery without violence, and there can be no larceny with it;" finding the dictionary's definition of "violent" dispositive, rather than surveying the true meaning of "violence" according to Colorado appellate court decisions), *pet. for cert. filed* April 4, 2017 (No. 16-8616).

As such, the decisions of these three circuits are in direct conflict at this time.[3] For the following reasons, that conflict is intractable, untenable, and potentially far-reaching. It should be resolved by the Court forthwith.

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[3] Until June 17th of this year, the decisions of the Tenth and Eleventh Circuits also conflicted with the Eighth Circuit's decisions in *United States v. Bell*, 840 F.3d 963, 965-967 (8th Cir. 2016) (holding that Missouri second degree robbery was not a "crime of violence" under the Guidelines), and *United States v. Swopes*, 850 F.3d 979, 981 (8th Cir. 2017)(following *Bell* to conclude that such a crime was likewise not a "violent felony" under the ACCA). However, on June 17th, the Eighth Circuit vacated *Swopes* and set that case for rehearing en banc.

A. The common law roots of the "overcoming resistance" requirement

Florida, like the majority of states, permits a conviction for robbery based on the use of force so long as the degree of force used is sufficient to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Although at least fifteen states have now expressly included some variation of this standard in the text of their statutes,[1] many others (including Florida, North Carolina, Virginia, and Colorado) have judicially recognized an "overcoming resistance" element through their caselaw.[2]

Notably, this widely-applied requirement of "victim resistance" in state robbery offenses, has deep roots in the common law. Common law robbery had an element labeled "violence." *See* 2 Joel Prentis Bishop, *Commentaries on the Criminal Law* § 966 (2nd ed. 1858) (defining robbery as "larceny committed by violence"); 4 William Blackstone, *Commentaries on the Laws of England* 241 (1st ed. 1765) ("Larciny from the person is either by privately stealing; or by open and

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[1]*See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz. Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y.Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[2]*See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1998); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth*, 462 S.E.2d 911, 913 (Va. 1995); *People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996); *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000).

violent assault, which is usually called robbery."); 3 Edward Coke, *Institutes of the Laws of England* 68 (1629) (explaining that robbery is a common law felony in which property is taken "by a violent assault"). It was sometimes said that robbery was a larceny committed "by violence *or* putting in fear." *E.g.*, 2 Edward Hyde East, *Pleas of the Crown* 707 (2d ed. 1806) (emphasis added). Although the "sudden taking of a thing unawares from the person," without more, did not involve "violence" and so was mere larceny, not robbery, *id.* at 708, as LaFave has noted, the difference between the two offenses was, in reality, a "fine distinction[]"; "[t]he line between robbery and larceny from the person (between violence and lack of violence)" was "not always easy to draw." 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3 (2d ed. 2016).

Nonetheless, the term "violence" did ***not*** imply a "substantial degree of force" at common law. *See Mahoney v. People*, 48 How. Pr. 185, 189 (N.Y. 1874) ("it is not the extent and degree of force which make the crime, but the success thereof.") *see also State v. Parsons*, 87 P. 349, 351 (Wash. 1906) ("[T]he degree of force used was *immaterial* as long as it was sufficient to compel the prosecuting witness to part with his property.")(Emphasis added).

The law d[id] not require that one be beaten before he submitted to the robbery to constitute the offense." *Gordon v. State*, 187 S.W. 913, 915 (Ark. 1916). No bodily injury or threat of bodily injury was necessary. Rather, it was "sufficient that so much force ... be used as might ... oblige a man to part with his property without or against his consent." 4 Blackstone, *Commentaries* 242.

As such, two recurring fact patterns defined the boundaries of "violence" for purposes of common law robbery.

First, any "struggle for possession of the property" between the criminal and the victim constituted "violence" sufficient to render the taking a robbery. 2 East, *Pleas of the Crown* 708; 2 William Russell, *Crimes and Indictable Offenses* 68 (2d ed. 1828); *State v. Trexler*, 4 N.C. 188, 192-93 (N.C. 1815). For example, in *Davies' Case* (Old Bailey, 1712), the court held that an offense was robbery (not merely larceny) where the defendant tried to surreptitiously snatch a sword from a gentleman's side, but "the gentleman perceived" the effort and "himself laid hold of [the sword] at the same time and struggled for it" before the defendant obtained possession. John Rood, *A Digest of Important Cases on the Law of Crimes* § 149 (1906). Similarly, in *Williams v. Commonwealth*, 50 S.W. 240, 240 (Ky. 1899), the court explicitly applying the common law of robbery, upheld a robbery conviction against the defendant's contention that he only committed a larceny where the defendant "wrenched [a] pocketbook out of [the victim's] left hand" and obtained possession because he was "stronger" than she was. The court explained: "It is not necessary that a blow should be struck or the party be injured, to be a violent taking; but if the robber overcomes resistance by force, he is guilty." *Id.* at 241; *see also* William Clark & William Marshall, *A Treatise on the Law of Crimes* 553 (2d ed. 1905) ("[I]f the victim] resists the attempt to rob him, and his resistance is overcome, there is sufficient violence to make the taking robbery, however slight the resistance." (citing *Davies' Case*)).

Second, even in the absence of a struggle between the parties, the "snatching" of an article "constitute[d] robbery" at common law if "the article [wa]s so attached to the person or clothes as to create resistance, however slight." 2 Bishop, *Commentaries* § 968; *accord* 1 William Odgers, *The Common Law of England* 333 (2d ed. 1920). For this proposition, Bishop and Odgers cite *Rex v. Mason*, 168 Eng. Rep. 876, 876 (1820), in which the theft of a watch was deemed a robbery because the defendant used "actual force" to break a chain that had been holding the watch around the victim's neck and thereby "overc[a]me the resistance" created by the chain. Early American common law cases explicitly followed (and arguably extended) *Mason*. For example, in *State v. McCune*, 5 R.I. 60 (1857), the court held that a defendant "used violence" sufficient to sustain a robbery conviction when he pulled and broke "a silk ribbon" holding a watch around the victim's neck. *Id.* At 61-62 (citing *Mason*). And in *State v. Broderick*, 59 Mo. 318 (1875), the court held that "[t[he violence used was sufficient" to sustain a robbery conviction where the defendant stole a watch chain by "seizing [it]" and "br[ea]k[ing] it loose from the watch and the button hole" to which it was attached. *Id.* At 319-21 (citing *Mason*).

Thus, all common law robberies were "violent," but in a very specialized sense of that word. The prosecutor did not need to show that the defendant caused or threatened to cause pain or injury or otherwise used force that was "substantial," "strong," or "extreme," as *Curtis Johnson* requires. 559 U.S. at 140-41. Indeed, courts and commentators often describe robbery as "a battery plus larceny." 4 *Wharton's Criminal Law* § 454; *see* 3 LaFave, *Substantive Criminal Law* § 20.3

("Since it is a battery to administer a drug to an unsuspecting victim, it seems clear that such conduct is 'force' which will do for robbery." (citation omitted)); *Morris v. State*, 993 A.2d 716, 735 (Md. Ct. Spec. App. 2010) ("Robbery is a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)."). And this Court was clear in *Curtis Johnson* that a simple battery does not require the use of physical force within the meaning of § 924(e)(2)(B)(i). 559 U.S. at 139-40. Common law battery is not a violent felony.

The Florida appellate courts, notably, have long recognized that the unarmed robbery offense originally described in Fla. Stat. § 812.13(1) ***was*** common law robbery. *See Montsdoca v. State*, 84 Fla. 82, 86 (1922) (reiterating the common law rules that "[t]here can be no robbery without violence, and there can be no larceny with it," and that "the degree of force used is immaterial"); *State v. Royal*, 490 So.2d 44, 45-46 (Fla. 1986) (acknowledging that "the common law definition of robbery" was "set forth in subsection (1)). As the Florida Supreme Court expressly recognized in *Royal*, the requirement in § 812.13(1) that the taking be by "force, violence, assault, or putting in fear" not only derived from the common law, but the Court had thereafter interpreted that provision "consistent with the common law." *Id.* at 46 (citing *Williams v. Mayo*, 126 Fla. 871, 875, 172 So. 86, 87 (1937)).

The only change to the common law robbery offense incorporated into that statutory provision occurred immediately after – and in response to – *Royal*, when the Florida Legislature broadened the statutory offense to include the use of "force" not only during a taking, but after it as well. *See, e.g., Foster v. State*, 596 So.2d

1099, 1107-1108 (Fla. 5th DCA 1992). Other than that, however, there has been no change to the underlying "common law definition of robbery set forth in subsection (1)," *Royal*, 490 So.2d at 46, to this day.

While the Eleventh Circuit has never acknowledged in its precedential robbery decisions (*Dowd*, *Lockley*, *Seabrooks*, or *Fritts*) that the unarmed robbery offense in Florida *is* essentially common law robbery, the Tenth Circuit in *Harris* did at least acknowledge that "Colorado remains committed to the common law definition of robbery," and defines the required the amount of force "consistent with the common law." *Harris*, 844 F.3d at 1267, 1270. It should have followed from that, and careful review of Colorado caselaw, that Colorado robbery is not a violent felony. *See, e.g., People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996) (holding as a matter of first impression that a purse snatching satisfied the "overcoming resistance" requirement of robbery, if the force was "of an extent that the victim is unable to retain control;" citing other state decisions holding similarly).

But like the Eleventh Circuit in *Fritts*, the Tenth Circuit in *Harris* refused to even consider the significance of *Davis*' facts or holding, given the Colorado Supreme Court's subsequent decision in *People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003) stating that "the gavamen of the offense of robbery is the *violent* nature of the taking." *Harris*, 844 F.3d at 1267 (emphasis added). Rather than delve beneath the surface of that statement in *Borghesi*, and recognize that "violence" was simply a common law term of art with a unique meaning, the Tenth Circuit summarily rejected the defendant's argument that the Colorado Supreme Court might not have

meant "violent" when it used the term "violence." Rather than deferring to *Davis*, as *Moncrieffe* and *Mathis* dictate, the Tenth Circuit deferred to the dictionary definition of "violent." *Id.*

Had the Tenth and Eleventh Circuits strictly applied the categorical approach as it has been clarified by this Court's recent precedents, and had the Tenth and Eleventh Circuits carefully analyzed the relevant state appellate caselaw as the Fourth Circuit did in *Gardner* and *Winston*, they would have concluded that neither Colorado robbery nor Florida robbery are categorically violent felonies under the ACCA.

B. The Tenth and Eleventh Circuits are in direct conflict with the Fourth Circuit as to whether "overcoming resistance" categorically requires "*violent* force."

In *Gardner*, the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina did not qualify as a "violent felony" under the ACCA's elements clause because it did not categorically require the use of "physical force." 823 F.3d at 803-804. In reaching that conclusion, the Fourth Circuit did not simply rely upon the common law principles set forth *supra*. Rather, consistent with the categorical approach as clarified by this Court in *Moncrieffe*, *Descamps*, and *Mathis*, the court thoroughly reviewed North Carolina appellate law to determine the least culpable conduct for a North Carolina common law robbery conviction. And notably, it was only after its thorough survey of North Carolina law, that the Fourth Circuit concluded that a North Carolina common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with

his property," and that "'[t]he degree of force used is immaterial.'" *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). In fact, the Fourth Circuit noted, *Sawyer*'s definition "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original).

The Fourth Circuit discussed two supportive North Carolina appellate decisions in detail. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). In *Chance*, the Fourth Circuit noted, a North Carolina court had upheld a robbery conviction where the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in *Eldridge*, a different court upheld a robbery conviction where a defendant merely pushed the shoulder of a store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and that the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*[4]

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[4] Although the Fourth Circuit did not discuss *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000) in *Gardner*, the government had discussed *Robertson* in in its *Gardner* brief, and had correctly described *Robertson* as holding that mere "purse snatching" does not involve sufficient force for a common law robbery conviction in North Carolina. Brief of the United States in *United States v. Gardner*, No. 14-4533 at 46-49, 53 (4th Cir. Aug. 21, 2015). *Robertson* had expressly recognized that North Carolina followed "'[t] rule prevailing in most jurisdictions" that "'the force used . . . must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.*'" *Id.* at 509 (quoting *State v. John*, 50 N.C. 163, 169 (1857)(emphasis added

Thereafter in *Winston*, the Fourth Circuit held that a conviction for Virginia common law robbery, which may be committed by either "violence or intimidation," does not qualify as a "violent felony" within the ACCA's elements clause since – as confirmed by Virginia caselaw – such an offense can be committed by only slight, non-violent force. *Id.* at 685.

The Fourth Circuit acknowledged in *Winston* that prior to *Curtis Johnson*, it had held that a Virginia common law robbery conviction qualified as a "violent felony" within the elements clause. However, citing *Gardner*, the Fourth Circuit rightly found that such precedent was no longer controlling after (1) this Court in *Curtis Johnson* not only redefined "physical force" as "violent force" but made clear that federal courts applying the categorical approach were bound by the state courts' interpretation of their own offenses, and (2) in *Moncrieffe* "instructed that we must focus on the 'minimum conduct criminalized' by state law." *Id.* at 684.

Consistent with these intervening precedents, the Fourth Circuit carefully examined for the first time in *Winston* how the Virginia state courts interpreted a robbery "by violence or intimidation." While noting that its prior decision in *Gardner* was "persuasive," the Fourth Circuit rightly acknowledged that its "conclusion that North Carolina robbery does not qualify as a violent felony" did not itself "compel a similar holding in the present case;" because it was required to "defer to the [Virginia] courts' interpretations of their own [] common law offenses." *Winston*, 850 F.3d at 685 n. 6.

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by *Robertson*)). The Fourth Circuit in *Gardner* was undoubtedly aware from *Robertson* that North Carolina robbery required overcoming victim resistance.

Accordingly, as it had done in *Gardner*, the Fourth Circuit undertook an thorough survey of Virginia appellate decisions on common law robbery. *See id.* at 684-685 (discussing in particular, and finding significant: *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at * 3 (Va. Ct. App. Dec. 12, 2000) (unpublished); and *Jones v. Commonwealth*, 26 Va. App. 736, 496 S.E.2nd 668, 670 (1998)). Citing these three decisions, the Fourth Circuit concluded that a Virginia common law robbery "by violence" requires only a "'slight' degree of violence;" that "anything which calls out resistance is sufficient;" and "such resistance by the victim does not necessarily reflect use of 'violent force.'" *Winston*, 850 F.3d at 684-685. And therefore, the Fourth Circuit expressly rejected the precise assumption made by the Eleventh Circuit in both *Seabrooks* and *Fritts*, without considering a single Florida decision: namely, that force sufficient to overcome resistance in Florida necessarily involves *violent* force. *Winston, id.* at 683. To the contrary, the Fourth Circuit held, the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force.'" *Id.* at 685.

Notably, Florida caselaw – like North Carolina and Virginia caselaw – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance under Fla. Stat. § 812.13(1). Like the North Carolina common law robery offense addressed in *Gardner*, and the Virginia common law robbery offense addressed in *Winston*, a Florida statutory robbery may also be committed by the minimal force

sufficient to overcome a victim's minimal resistance. Indeed, a simple survey of Florida's own appellate law (consistently ignored by the Eleventh Circuit) easily confirms this point.

In *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993), a Florida appellate court found force sufficient to tear a scab off a victim's finger was enough to sustain conviction for robbery. *Id.* at 690. In *Sanders v. State*, 769 So. 2d 506 (Fla. 5th DCA 2000), another Florida appellate court affirmed a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand. The court explained that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders," thus confirming that no more resistance, or "force" than that was necessary for a strongarm robbery conviction under § 812.13(1)). *Id.* at 507-508. In *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001), a Florida court upheld a conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from bebind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred," and did not fall. And most recently, in *Benitez -Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011), one final Florida appellate court decisively rejected a defendant's argument that actual "violence" was necessary for a strongarm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence." That

simple act of "tugging," the court held, was sufficient to prove "the use of force to overcome the victim's resistance." *Id.* at 323.

Had the Fourth Circuit heard Mr. Stokeling's case, and specifically considered this Florida caselaw that, it would have found that like the robbery offense in *Gardner*, Florida robbery may be committed by using only a *de minimis* degree force, and therefore does not categorically require the use of "physical force." It has always been the law in Florida (as in North Carolina) that the degree of force is "immaterial." *Montsdoca v. State*, 93 So.157, 159 (Fla. 1922). And, as the Fourth Circuit recognized in *Gardner*, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. The standards in *Sawyer* and *Montsdoca* are similarly worded and functionally indistinguishable.

Plainly, the act of peeling back the victim's fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance*. Both acts allowed the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "*violent* force' required by *Curtis Johnson*. And plainly, the "bump" in *Hayes* is indistinguishable from the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victim in *Hayes* did not even fall. And the "bump" in *Hayes* also appears to involve less than the "extent of resistance" in *Jones* – which

was the defendant's "jerking" of the victim's purse, which caused her to "turn and face" the defendant, but was not strong enough to cause the victim to fall down. *Winston*, 850 F.3d at 685 (citing *Jones*, 496 S.E. 2nd at 669-670). Moreover, Florida law even suggests that something even less than a "bump" – namely, such *de minimis* conduct as "jostling" a victim during a pickpocketing, *see Rigell v. State*, 782 So.2d 440, 442 (Fla. 4th DCA 2001)(approving LaFave's example) – will constitute sufficient "force" to "overcome resistance," take a person's property, and seal a robbery conviction.

Reading *Montsdoca* as the Fourth Circuit read *Sawyer*, and consulting the pertinent Florida caselaw here, the Court should come to the same conclusion as the Fourth Circuit did first in *Gardner*, and thereafter in *Winston*. It should hold, specifically, that a Florida statutory robbery – despite the fact that it necessitates overcoming "victim resistance" – does not categorically require the use of "*violent* force" in every case. Such an offense falls outside the ACCA's elements clause.

B. The circuit conflict is intractable and untenable. It is prejudicing Tenth and Eleventh Circuit defendants, and should be resolved

In a series of recent decisions since *Fritts*, the Eleventh Circuit – which applies its "prior panel precedent rule" more rigidly than any other circuit in this country[5] – has adhered rigidly to *Fritts*. Not only in Mr. Stokeling's case, but in multiple other cases as well, the Eleventh Circuit continues to affirm ACCA sentences predicated upon Florida robberies based upon *Fritts*. *See, e.g., United*

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[5] *See* the pending petition for writ of certiorari in *Warren Golden v. United States*, No. 17-5050, where certiorari has been sought on that basis.

States v. Conde, ___ Fed. Appx. ___, 2017 WL 1485021 (11th Cir. April. 26, 2017); *United States v. Hughes*, ___ Fed. Appx. ___, 2017 WL 2471207 (11th Cir. June 8, 2017); *United States v. Smith*, ___ Fed. Appx. ___, 2017 WL 2477356 at *2 (11th Cir. June 8, 2017); *United States v. Williams*, ___ Fed. Appx. ___, 2017 WL 2712964 at *2 (11th Cir. June 23, 2017); *United States v. Burke*, ___ F.3d ___, 2017 WL 3044623 (11th Cir. July 19, 2017); *United States v. Everette*, ___ F.3d ___, 2017 WL 3309732 (11th Cir. Aug. 3, 2017).[6]

In *Everette*, notably, the appellant filed a request for an initial en banc hearing with the hopes that the Eleventh Circuit would reconsider *Fritts'* holding that all Florida robbery offenses categorically qualify as ACCA "violent felonies." But not one judge in active service on the court voted for en banc consideration, and Everette's request was summarily denied. *United States v. Everette*, Slip op. (11th Cir. July 31, 2017).

Accordingly, with this spate of recent decisions, the Eleventh Circuit has made undeniably clear that its conflict with the Fourth Circuit is intractable. The Eleventh Circuit will not reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of *violent* force. And it is unlikely that the Tenth Circuit will reconsider whether a Colorado robbery, or any other common law robbery offense, is categorically an ACCA predicate either.

The only hope for defendants in these circuits, plainly, is for this Court to grant certiorari to resolve this conflict once and for all. The instant case presents the Court with a perfect vehicle in which to do that for several reasons. First, the

[6] Certiorari will be sought in all of these cases.

"overcoming resistance" issue raised herein was specifically pressed below. That is not true of all current Eleventh Circuit cases in the pipeline to this Court. Second, if Mr. Stokeling's prior Florida robbery convictions do not qualify as "violent felonies" under the ACCA's elements clause for the reasons raised herein, he was ineligible for enhanced sentencing under the ACCA as the district court originally found. The Eleventh Circuit will have erred in vacating and remanding his case for enhanced sentencing now as an Armed Career Criminal. Mr. Stokeling should serve out the remainder of his 73 month sentence and be released. Finally, this case comes to the Court on direct appeal, and it raises a single discrete issue for review. There are no side issues here, as there often are on collateral review.

Nevertheless, if the Court believes that either another pending Eleventh Circuit case or *Harris* presents a better vehicle for resolving the circuit conflict presented herein, Mr. Stokeling asks that the Court hold his case pending its resolution of the common issues these cases share.

CONCLUSION

Resolution of the elements clause questions raised by Stokeling will have far reaching impact not only for other Eleventh Circuit defendants, but for Tenth Circuit defendants as well. And potentially, it could impact defendants in other circuits with common law robbery convictions or statutory robbery convictions that are based on common law robbery. Until this Court definitively resolves the current circuit conflict on whether overcoming "victim resistance" categorically meets the

ACCA elements clause, other circuits might follow *Fritts* or *Harris* and more defendants will be prejudiced.

The ACCA's elements clause, notably, is identical to the elements clause used in the Career Offender provision of the Guidelines, as well as in the commentary to the reentry guideline, U.S.S.G. § 2L2.1, comment. n. 2. And it is virtually identical to the elements clause in both 18 U.S.C. § 16(a), and in 18 U.S.C. 924(c)(3)(A). Therefore, the Court's resolution of the questions in this case will not only affect which robbery offenses are properly counted as "violent felonies" under the ACCA, and "crimes of violence" under the Guidelines, but potentially (depending upon the Court's resolution of the residual clause question in *Sessions v. Dimaya*, No. 15-1498 (argued Jan. 17, 2017)), which state robbery offenses will qualify as "aggravated felonies" pursuant to 8 U.S.C. 1101(a)(43)(F)(which incorporates the "crime of violence" definition in § 16). Indeed, the questions raised herein might even impact whether federal robbery offenses such as Hobbs Act robbery in violation of 18 U.S.C. § 1951 qualify as § 924(c) predicates going forward.
This case is an excellent vehicle for certiorari for these reasons as well.

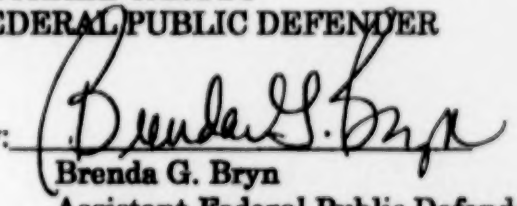
Finally, in the three decades that have passed since Congress amended the ACCA to delete "robbery" and "burglary" as automatic ACCA predicates, replacing those two specific crimes with broader "violent felony" definitions designed to better target the most dangerous gun offenders, the Court has granted certiorari multiple times to determine whether state burglary offenses were proper ACCA predicates. It has never, however, considered an ACCA sentence predicated upon a state

robbery offense. And the time has come to test the government's repeated assertions, accepted now by two circuits with little or no analysis, that *any* robbery offense that requires overcoming "victim resistance" is sufficiently dangerous that it deserves enhanced punishment under the ACCA.

The direct circuit conflict that currently exists on that issue is prejudicing defendants in two federal circuits, and the disparate treatment of defendants in these circuits must come to an end. The Court should grant the writ.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 
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Fort Lauderdale, Florida
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